United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1080

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No. 75-1079
No. 75-1105
No. 75-1106
No. 75-1120
No. 75-1111
No. 75-1080
No. 75-1112

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

IN THE MATTER OF:

JOSEPH BUSCAGLIA, A Grand Jury Witness, Docket No. 75-1079
LAWRENCE PANARO, A Grand Jury Witness, Docket No. 75-1105
GASPER BONA, A Grand Jury Witness, Docket No. 75-1106
FRANK MAMBRINO, A Grand Jury Witness, Docket No. 75-1120
ROBERT OLIVER, A Grand Jury Witness, Docket No. 75-1111
JOSEPH MOSES, A Grand Jury Witness, Docket No. 75-1080
DECIMO CICERO, A Grand Jury Witness, Docket No. 75-1112

BRIEF FOR THE UNITED STATES OF AMERICA,

Appellee

On Appeal from the United States District
Court for the Western District of New York

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Western District of New York
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APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NEW YORK

Honorable John T. Curtin, District Judge

BRIEF FOR APPELLEE

ISSUES PRESENTED FOR REVIEW

In the joint brief submitted on behalf of Appellants Buscaglia, Panaro, Bona, Mambrino and Oliver, the following issues were presented for review by this Court:

(1) Whether the Government's response to Appellants' claims of unlawful electronic surveillance was sufficient, under 18 U.S.C. §3504, for the protection of Appellants' rights not to be compelled to answer questions derived from such unlawful electronic surveillance?

(2) Whether, in light of the evidence that Appellants' rights of freedom of speech and associational privacy were infringed in the Grand Jury proceeding, Appellants could validly be held in civil contempt pursuant to 18 U.S.C. §1826?

STATEMENT OF FACTS

This appeal arises from a series of orders from the Honorable John T. Curtin of the Western District of New York remanding the five witness-appellants to the custody of the United States Marshals for refusing, while under a grant of immunity, to answer questions before a federal grand jury. These five appeals have been consolidated along with two others (Decimo Cicero, No. 75-1112 and Joseph Moses, No. 75-1080)[1] by order of this Court.

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1. Decimo Cicero appeared before the Grand Jury on April 2, 1975, and answered all of the questions which were asked of him. Accordingly, Judge Curtin acted on April 1 to vacate his order of March 19, 1975 whereby he remanded Cicero for refusing to testify pursuant to Section 1826 of Title 28. It appears, therefore, that Cicero's appeal to this Court is now moot.

Two other Grand Jury witnesses (Salvatore Caci and Salvatore Bonito) have been remanded by Chief Judge Curtin for similar refusals to testify and have appealed to this Court. At the time of this writing, these two appeals have not been formally consolidated with those of the other witnesses.

The factual circumstances which preceded the contempt citations in all of these cases are all quite similar. Before relating the factual background which is unique to each of the witnesses, it may be helpful to set forth the information which is common to all.

During February of 1975, the Appellants were subpoenaed (along with some thirty other persons) to appear as witnesses before the Federal Grand Jury in Buffalo, New York. As stated in the Government's application for immunity in each of the Appellants' cases, the Grand Jury was investigating violations of Sections 1955 (illegal gambling business), 892-94 (extortionate credit transactions) and 1962 (racketeering) of Title 18 of the United States Code. (See, e.g. Buscaglia Record on Appeal, Exhibit 1.)

On February 20, 1975, the first of these witnesses appeared before Chief Judge Curtin on the Government's applications for immunity. The Judge asked Special Attorney Robert C. Stewart to describe the nature and scope of the Government's

investigation and how it related to a violation of federal law. Stewart stated that:

> "It is our, - on information and belief, the two social clubs operate a card game, but not a normal card game. This is a house-operated card game in which the house receives five per cent of the proceeds. Now, that is the basic gambling predicate, but in addition to that and coincidental with the operation of the game, money is loaned by the house to various players in order to encourage the game and increase the stakes. The game is such that the house cannot lose. The players do not play against the house, but against each other and the house simply takes five per cent from the top. Now, the amounts that are loaned are normally interest free for the first seventy-two hours. Thereafter, they become so-called six for five loans of the sort which are prohibited by the Loan Shark Statute. That is Sections 892 to 894. Quite aside from that particular activity, loan activity, we have reason to believe that certain individuals . . . have used those clubs as locations in which they conduct a regular loan shark operation. That is, money, large sums of money, thousands of dollars are loaned to individuals at a six for five basis regularly and we have reason to believe, as your Honor knows, from Mr. Timineri, that some violence has been, is and continues to be connected with the collection of these particular loans." (Appellants' Supplemental Appendix, p. 129)[1]

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1. Due to the expedited nature of these appeals, the Government and the Appellants did not attempt to reach an initial agreement as to the contents of the Appellants' Consolidated Appendix as provided in Rule 30 of the Federal Rules of Appellate Procedure. Consultation and agreement followed the submission of the Appellants' Appendix, and an Appellants' Supplemental Appendix (incorporating relevant aspects of oral argument) was prepared by mutual agreement. In addition, it may become necessary to refer to other items in the record which are not included in either Appendix. It is believed that such reference is authorized by Rule 30(a) of the Federal Rules of Appellate Procedure.

Special Attorney Stewart also stated that "the questions as to all the witnesses will be essentially the same and are related to the same investigation." (Id. at p. 128)

With this general factual background established, we turn to the facts relating to each Appellant.

1. Joseph Buscaglia

A subpoena was served on Appellant Buscaglia requiring his appearance before the Federal Grand Jury in Buffalo on February 20, 1975. Buscaglia appeared before the Grand Jury on February 20 and refused to answer any questions, claiming his privilege against self-incrimination. On that same day, the Government made application to Judge Curtin for a grant of immunity for Buscaglia pursuant to Sections 6002-03 of Title 18 of the United States Code. (Buscaglia Record on Appeal, Exhibit 1.) Judge Curtin deferred any action on the Government's application until Buscaglia could obtain counsel; counsel was appointed on February 21, 1975.

On February 25, 1975, Buscaglia appeared with his counsel, and Judge Curtin granted the Government's application for immunity. (Id.) Buscaglia appeared before the Grand Jury on that same day, and refused to answer any of the questions asked on the ground that his answers could incriminate him.

(Id., Exhibit 13.) Immediately after this refusal, the Government served its notice of motion pursuant to Section 1826 of Title 28 on Buscaglia and his counsel. (Id., Exhibit 2.) The motion was scheduled to be heard on March 4.

On March 4, 1975, Buscaglia appeared before Judge Curtin with his counsel who submitted an "affidavit" raising certain legal arguments. (Appellants' Consolidated Appendix, Item 7 [hereinafter referred to as "Consol. App."]) In this affidavit and in oral argument, Buscaglia's counsel asserted that the questions to be asked were based on some form of electronic surveillance of the witness. Special Attorney James W. Gresens answered unequivocally that Buscaglia had not been "overheard on any wiretaps or electronic surveillance." (Appellants' Supplemental Appendix, p. 17 [hereinafter referred to as "Supp. App."]) Buscaglia's counsel also demanded to know whether any electronic surveillance had been used at the Gettysburg Social Club. The Special Attorney declined to affirm or deny with respect to electronic surveillance, if any, at the Club. In support of this position the Government asserted that Buscaglia lacked standing to question the use of electronic surveillance at any location because he had not been overheard. (Id. at p. 17.) When questioned by Judge Curtin regarding this position, Special Attorney Gresens stated that "we have an investigation that is ongoing and I don't think that we should be required to disclose

what types of investigative techniques we have used at what locations." (Id. at p. 18.) Judge Curtin deferred further argument on this matter. He ordered that the witness return to the Grand Jury and that the Government ask more particularized questions "directed to show some violation of Section 1955, 892, 894 or 1962 . . ." (Id. at p. 20.)

Immediately following this direction, an in camera conference was held between Judge Curtin and Special Attorney Gresens. (Consol. App., Item 19.) Gresens stated that no electronic surveillance had been used at the Gettysburg Social Club and "we have not tapped any of the places, for that matter." (Id. at p. 127) Disclosure of this information in open court was considered to be a danger because the Government's informant was still actively engaged in the investigation at that time. (Id. at p. 129) The Special Attorney agreed with Judge Curtin's summarization to the effect that "the reason you don't want to make a statement in open court about this is that if they know definitely that there was no electronic surveillance then the witnesses will begin to suspect 'well, there must be some other means' . . . they would be looking at each other and then determine who the informer is." (Id. at p. 128) Judge Curtin directed that the record of the in camera proceedings be sealed until such time as it would be safe to expose the fact that an informant was present at the two "social" clubs. (This record was unsealed pursuant to the Government's motion on March 14, 1975.)

Later on March 4, 1975, Buscaglia appeared once again before the Grand Jury and refused to answer questions propounded there. (Consol. App., Item 6.) Judge Curtin adjourned the contempt proceeding until March 7 to allow counsel for the witness to obtain and review a transcript of the Grand Jury proceeding on March 4.

The Government's motion to remand Buscaglia pursuant to Section 1826 was heard on March 7. At this time two affidavits were submitted on behalf of the witness-appellant. (Id., Items 8 and 9.) James W. Gresens, the Special Attorney in charge of the investigation, submitted an affidavit in regard to electronic surveillance in which he stated:

> "5. That on March 3, 1975, Special Agent Poerstel advised me that he had checked the records of the Federal Bureau of Investigation for the period commencing on January 1, 1974 through and including March 3, 1975, and that the Federal Bureau of Investigation had not conducted any form of electronic surveillance at the residence of JOSEPH BUSCAGLIA, and had not overheard JOSEPH BUSCAGLIA on any form of electronic surveillance during the aforespecified period of time." (Id., Item 14, p. 2.)

Following argument, Judge Curtin remanded Buscaglia to the custody of the United States Marshal, pursuant to Section 1826 of Title 28. (Buscaglia Record on Appeal, Exhibit 8.)

The facts relating to Appellants Panaro, Bona, Mambrino and Oliver are quite similar to those set forth for Buscaglia. The Government's introductory statements to the Court, arguments,

moving papers and affidavits were essentially the same in each case. Furthermore, counsel for each of the Appellants joined, where appropriate, in the arguments and motions of all other Appellants. Therefore, since we have set forth the facts relating to Buscaglia in some detail, the background data for the other Appellants may be summarized as follows.

2. Lawrence Panaro

Appellant Panaro appeared before the Grand Jury in Buffalo pursuant to a subpoena on February 20, 1975, and refused to answer any questions until he obtained counsel. Panaro appeared with counsel on February 25, and was granted immunity from prosecution by Judge Curtin. (Panaro Record on Appeal, Exhibit 1.) He appeared before the Grand Jury on that same day and refused to answer any questions propounded there. Immediately after this refusal, the Government's notice of motion to remand pursuant to Section 1826 (scheduled for March 4) was served on Panaro and his counsel. (Id., Exhibit 3.)

On March 5, 1975, Judge Curtin directed that the Government return Panaro to the Grand Jury so that more specific questions could be asked of him there. (Supp. App., p. 76.) Panaro appeared before the Grand Jury on the same day and once again refused to answer any questions. (Consol. App., Item 10.)

On March 17, 1975, Panaro appeared before Judge Curtin with his counsel. Judge Curtin afforded Panaro the opportunity to return to the Grand Jury immediately, if he so desired, to answer questions there. (Supp. App., p. 95.) Panaro declined, and Judge Curtin remanded him to the custody of the Marshals pursuant to Section 1826 of Title 28. (Panaro Record on Appeal, Exhibit 6.)

3. Gasper Bona

Appellant Bona was subpoenaed to appear before the Grand Jury in Buffalo on February 20. He appeared on that date and refused to answer any questions, claiming his privilege against self-incrimination. Judge Curtin signed the order granting Bona immunity from prosecution on that same day. (Bona Record on Appeal, Exhibit 1.) Bona was directed to appear with counsel on February 25 to testify before the Grand Jury under a grant of immunity.

Bona appeared before the Grand Jury on February 25 and, while under the Court's order of immunity, refused to answer any of the questions propounded there. Immediately after this refusal, the Government's notice of motion to remand pursuant to Section 1826 (scheduled for March 4) was served on Bona. (Id., Exhibit 2.)

On March 4, 1975, Judge Curtin directed that Bona return to the Grand Jury so that more specific questions could be put to him there. Bona returned to the Grand Jury on that same day and refused to answer any of the questions asked. (Consol. App., Item 11.) On March 7, Bona was remanded pursuant to Section 1826 of Title 28 by Judge Curtin for refusing to testify. (Bona Record on Appeal, Exhibit 5.)

4. Frank Mambrino

Appellant Mambrino first appeared before the Grand Jury on February 20, 1975 pursuant to subpoena. He refused to answer any questions at that time claiming his privilege against self-incrimination.

Mambrino appeared before Judge Curtin on March 6, 1975 and, pursuant to the Government's application, was granted immunity from prosecution. (Mambrino Record on Appeal, Exhibit 1.) Mambrino appeared before the Grand Jury on the same day and again refused to answer any of the questions asked there. (Consol. App., Item 12.) Immediately after this refusal, the Government's notice of motion to remand pursuant to Section 1826 was served on Mambrino and his counsel. (Mambrino Record on Appeal, Exhibit 2.)

Mambrino came before Judge Curtin on March 17, and was remanded pursuant to Section 1826 of Title 28 for refusing to testify. (Id., Exhibit 4.)

5. Robert Oliver

Appellant Oliver first appeared before the Grand Jury pursuant to subpoena on February 20, 1975. He refused to answer any questions at that time based on his privilege against self-incrimination.

Counsel was assigned on February 27, and Judge Curtin granted the Government's application for immunity on March 6. (Oliver Record on Appeal, Exhibit 1.) Oliver appeared before the Grand Jury on March 6 and refused to answer all of the questions that were asked there.

On March 19, 1975, Oliver appeared before Judge Curtin with his counsel and was remanded pursuant to Section 1826 of Title 28 for refusing to answer questions while under a grant of immunity. (Id., Exhibit 4.)

* * *

In each of these cases the Special Attorney in charge of the investigation, James W. Gresens, filed an affidavit in which he stated that each Appellant's residence had not been the subject of electronic surveillance and that none of the Appellants had been overheard on any electronic surveillance during the investigation. (Consol. App., Items 14-18.)

A R G U M E N T

POINT I

THE GOVERNMENT'S DENIALS -- BY AFFIDAVIT AND IN CAMERA -- OF THE USE OF ELECTRONIC SURVEILLANCE WERE SUFFICIENT TO REQUIRE THE APPELLANT-WITNESSES TO ANSWER QUESTIONS BY THE GRAND JURY.

It appears from POINT I of the Appellants' Brief that the nub of their complaint regarding electronic surveillance is that the form of the Government's denial in the District Court was inadequate. It is submitted that this assertion of error should be rejected for the following reasons.

(A) The Government Responded to the Appellants' Assertions of Electronic Surveillance by Affidavit as Required by the Law of this Circuit.

Section 2515 of Title 18 of the United States Code (1970) prohibits the use of any eivdence derived from unlawful electronic surveillance in a grand jury or other judicial proceeding. In Gelbard v. United States, 408 U.S. 41 (1972), the Supreme Court held that the use of unlawful electronic surveillance was a defense in a remand proceeding pursuant to Section 1826 of Title 28 (1970).

Section 3504(a)(1) of Title 18 (1970) provides that whenever a "party aggrieved" claims that evidence derived from an unlawful act is inadmissable "the opponent of the claim shall

affirm or deny the occurrence of the alleged unlawful act . . .". This Court in United States v. Toscanio, 500 F.2d 267, 281 (2d Cir. 1974), has adopted the rule that an allegation of unlawful surveillance requires that the Government's denial be made in affidavit form.

The Government's denial of electronic surveillance in each of the Appellants' cases was made by affidavit. (See Consol. App., Items 14-18.) In these affidavits, the Special Attorney in charge of the investigation stated that a named Agent of the Federal Bureau of Investigation had advised him that a check of the records of that agency indicated that the residence of each Appellant had not been the subject of an electronic surveillance, and that each Appellant had not been identified "on any form of electronic surveillance during . . ." the course of the investigation. The form and content of these affidavits is identical to the requirements elucidated in Korman v. United States, 486 F.2d 926 (7th Cir. 1973). See also United States v. Fitch, 472 F.2d 548 (9th Cir. 1973).

The affidavits submitted by the Special Attorney also stated that "the aforesaid investigation . . . has been conducted solely by the Federal Bureau of Investigation." In the case of In re Tierney, 465 F.2d 806, 813 (5th Cir. 1972), it was held that a check of all federal agencies was unnecessary where the

records of every agency involved in the investigation were checked. See also United States v. Grusse, No. 75-2029, Slip. Op. 2039 (2d Cir. Feb. 27, 1975) (Lumbard, J. concurring).

Despite the Government's statement -- in affidavit form -- that none of the Appellants were identified on any electronic surveillance during the course of the investigation which led to their Grand Jury appearances, the Appellants urge that something more is required. Specifically, they claim that it was error for the trial court to allow the Government to refuse/to affirm or deny -- in open court -- the use of electronic surveillance at two "social" clubs. We now turn to this contention.

(B) It Was Not Error for the Trial Court to Allow the Government to Make an Unsworn Denial, In Camera, Regarding the Use of Electronic Surveillance at the Two "Social" Clubs.

Prior to setting forth our legal argument here, it may be helpful to reiterate some of the facts which occurred in the District Court.

In an "affidavit" submitted to the District Court on March 4, 1975, counsel for Buscaglia stated that "Upon information and belief, the Gettysburg Social Club at 374 Connecticut Street, in Buffalo, New York has had its telephones tapped." (Consol. App., Item 7.) Counsel did not set forth the source of his information

or the grounds for his belief. In fact, during the course of oral argument on March 7, counsel negated the statement in his own affidavit by asserting that "it can't be a wiretap because as I understand, there are no telephones" at the Gettysburg Social Club. (Supp. App., p. 38.)

In the same affidavit counsel also stated that "Upon information and belief, the investigation which the Grand Jury is conducting and the questions which the Grand Jury wishes to be submitted to JOSEPH BUSCAGLIA are based directly or indirectly upon information obtained by an illegal wiretap." (Consol. App., Item 7.) Once again, counsel did not offer to make the sources for his "information and belief" concerning the "illegal wiretap" a part of the record of these proceedings. Instead, during oral argument on March 4, counsel expanded his allegation to include "any eavesdropping of any nature on the Gettysburg Social Club . . ." (Supp. App., p. 16.)

Counsel for the Government responded by stating that "Mr. Buscaglia was not overheard on any wiretaps or electronic surveillance . . .". (Id., p. 17.) (See also, Government Affidavit -- Buscaglia, Consol. App., Item 14.) The Special Attorney refused to affirm or deny the use of electronic surveillance at the Gettysburg Social Club on the ground that only a person whose conversation is overheard has the "standing" to raise a question

of electronic surveillance. (Supp. App., p. 17.) The Special Attorney also stated that "we have an investigation that is ongoing and I don't think that we should be required to disclose what types of investigative techniques we have used at what locations. (Id., p. 18.) Following this exchange, an in camera conference between the District Court Judge and the Special Attorney occurred. (Consol. App., Item 19.) During this conference the Special Attorney informed the District Court that electronic surveillance had not been used at the clubs.

In their Brief before this Court the Appellants urge that the Government's in camera response to the allegation of electronic surveillance at the two "social" clubs is inadequate on two separate grounds: (1) the Special Attorney's response was unsworn; and (2) the in camera conference does not indicate the basis of the Special Attorney's knowledge.

(1) There is No Requirement that an In Camera Presentation be Sworn To.

This precise issue was before the Court in United States v. D'Andrea, 495 F.2d 1170 (3d Cir. 1974). That case involved a violation of the income tax laws in which the defendant alleged that unlawful electronic surveillance was used to obtain evidence against him. A letter was filed by an acting Assistant Attorney General

stating that the appropriate agencies had been checked with negative results. (Id. at 1173.) Affidavits were also filed by the investigators and prosecutors denying the use of electronic surveillance in the case. (Id. at 1173-74, n. 11.) The appellant contended, however, that it was error to allow the Government to make "an in camera ex parte presentation with regard to the claim of electronic surveillance." (Id. at 1174.) The Court dismissed this contention stating:

> "As Alderman v. United States, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969) makes clear, there are some situations in which an adversary proceeding is required in order to protect a defendant's fourteenth amendment rights. In that case, the Court barred the district court from reviewing illegally obtained material in camera in order to judge its "arguable relevance" to the case presented by the government. Its conclusion was based on the belief that the complexity of the task made the safeguard of an adversary proceeding necessary.
>
> In other situations, however, where similar complexity is not presented in camera proceedings are permissible. Taglianetti v. United States, 394 U.S. 316, 89 S.Ct. 1099, 22 L.Ed.2d 302 (1969); Giordano v. United States, 394 U.S. 310, 89 S.Ct. 1163, 22 L.Ed.2d 297 (1969) (Stewart, J. concurring). This case clearly falls into this latter category. The in camera proceeding here did not deal with the question of whether existing illegal taps tainted the proceedings. Instead, it dealt with the prior question of whether the alleged illegal surveillance had occurred at all. This is the same question that was the subject of an in camera hearing in Taglianetti, and in that case the Court held that the issues presented were not complex enough to require the safeguards of an adversary proceeding as a matter of law. 394 U.S. at 317-318, 89 S.Ct. 1099. We feel that the same conclusion is warranted here." (495 F.2d at 1174.) (emphasis added)

We submit that the facts of the in camera conference of which the Appellants complain track precisely those which the Third Circuit found proper in D'Andrea. Moreover, as the in camera conference in the instant proceedings clearly indicates, there was a legitimate concern for the safety of a Government informant. This concern militated most strongly against disclosure of the lack of electronic surveillance in open court.

Thus, based on the rationale of D'Andrea as well as the unique circumstances of this case, we submit that it was completely proper for the District Court to proceed in camera. We would also point out that Appellants Panaro, Oliver and Mambrino were remanded after the District Court ordered the transcript of the in camera conference unsealed on March 14, 1975. (See, e.g., Panaro Record on Appeal, Exhibit 8.) And, no objection to the form of the Government's denial was made at their remand proceedings.

Based on the record as a whole, the District Court did not err by considering the Government's denial of electronic surveillance in camera.

(2) The Basis of the Special Attorney's Knowledge Was Established by the Government's Affidavit Denying the Use of Electronic Surveillance.

In their Brief, the Appellants argue that the in camera conference suffers from a separate infirmity in that it does not

indicate the basis for the Special Attorney's knowledge regarding the use of electronic surveillance at the two clubs. This contention should be rejected.

In the affidavits which were filed in each of the Appellant's cases, Special Attorney James W. Gresens stated that he was "fully familiar with all of the facts and circumstances . . ." of each Appellant's case. (Consol. App., Items 14-18, paragraph 1.) He also stated that he was "personally in charge of the investigation of the activities occurring at Nairy's Social Club and the Connecticut Social Club [i.e., the Gettysburg Social Club] in Buffalo, New York." (Id., paragraph 2.)

Although these averments were not repeated during the in camera conference, they are a part of the record nonetheless. And, the Appellants have offered not a scintilla of evidence to controvert the declarations made by Special Attorney Gresens in his affidavit.

In regard to the Special Attorney's ability to make an informed statement regarding the use of electronic surveillance, Judge Lumbard's statements in the very recent case of In re Grusse, No. 75-2029, Slip. Op. 2039 (2d Cir. Feb. 27, 1975), are enlightening:

> "It must be remembered that any electronic surveillance by the government is relevant only if it is somehow used in formulating questions that the grand jury intends to ask. . . . I think that the assistant United States attorney handling a case and the FBI agent in charge of

> the investigation are the two people most likely to know if the fruits of any electronic surveillance were used to gain information on which the grand jury would base its questions." (Slip. Op. 2042-43.)

We submit that the foregoing circumstances and authorities make it clear that it was completely proper for the District Court to rely on the in camera denials of electronic surveillance made by the Special Attorney.

(C) Once the Government Has Properly Denied the Use of Electronic Surveillance the Burden Shifts to the Witness to Show that the Denial is False.

We believe that the foregoing argument under Subpoint (A) -- immediately preceding -- amply demonstrates that the form of the Government's denial of electronic surveillance was proper in each Appellant's case. Nevertheless, we wish to point out that once the Government has denied overhearing a witness' conversation, more than a "suspicion" is necessary to require the Government to further prove the negative. We shall proceed to make this point as briefly as practicable here.

In Womack v. Meiszner, 466 F.2d 555 (7th Cir. 1972), two witnesses refused to testify before the grand jury, averring in conclusory terms that they had been the subject of electronic surveillance. This allegation was denied by a letter from an assistant Attorney General based on the review of the files of

the Federal Bureau of Investigation. Relying on the Supreme Court's decision in Alderman v. United States, 394 U.S. 165 (1969), the Womack Court held that:

> "only the person whose privacy is invaded by an illegal electronic surveillance has standing to object.
>
> Hence, the representations in this case by the Department of Justice that the privacy of neither relator was subject to interference put 'the matter . . . at an end and the witness[es] must answer.' See Fraser v. United States, 452 F.2d 616 (7th Cir. 1971); United States v. Doe, 451 F.2d 466 (1st Cir. 1971)." 466 F.2d 555, 558

The Womack case clearly holds that once the Government has properly denied the use of electronic surveillance in a given case, the witness is required to come forward with some information or evidence demonstrating good cause to believe that the Government's denial is false.

This question was before the Court of Appeals for the Third Circuit in the case of In re Grumbles, 453 F.2d 119 (3d Cir.), cert. denied, 406 U.S. 932 (1971), which involved a contempt proceeding pursuant to Section 1826 of Title 28. The Grumbles Court stated that:

> "Counsel for the Grumbles has also argued that the Government has not made a sufficient showing that the questioning of the Grumbles by the grand jury is not the product of electronic surveillance proscribed by the Constitution and 18 U.S.C. § 2515. As indicated above, counsel for the Government assured the district court that neither of the Grumbles nor any premises over which they have any proprietary

> interest has been the subject of any electronic surveillance at all, legal or illegal, and this assurance has been restated in affidavit form. The Grumbles have not presented any evidence demonstrating that these representations by the Government are false, and this contention is rejected. In Re Idella Marx, 451 F.2d 466 (1st Cir., 1971); Russo v. United States, 404 U.S. 1209, 92 S.Ct. 4, 30 L.Ed.2d 13 (1971) (Douglas, J., sitting as Circuit Justice)." 458 F.2d 468, 470. (emphasis added)

See also In re Horn, 458 F.2d 468 (3d Cir. 1972). It is also significant to note that the decisions in Grumbles and Horn were cited by this Court in United States v. Toscanio, 500 F.2d 267, 281 (1974), when the requirement that the Government respond by affidavit was announced as the law of this Circuit.

In the instant appeals Appellants furnished not a scintilla of information or evidence to show that the Government's denial was false or inaccurrate. The only material in the record to controvert the Government's denial that any of the Appellants had been overheard were the assertions of counsel at oral argument that "I would suspect that if there is a bug in there . . . It would have to be some general intrusion listening to many voices and many conversations . . . ." (Supp. App., p. 38.) (emphasis added)

We submit that the unsubstantiated suspicions of counsel are insufficient to require the Government to expend further time and effort in proving that no intrusion occurred. Were it otherwise, the grand jury's investigation would be delayed endlessly

while the Government sought new ways to allay even a good faith suspicion that a "cover up" -- inadvertent or otherwise -- was in progress.

(D) Even When a "Possibility" of Electronic Surveillance Remains the Witness is Still Required to Answer

Under POINT I of their Brief, the Appellants state on several occasions that -- despite the Government's denials -- the "possibility" remains that they were subjected to electronic surveillance. This "possibility" they assert constitutes "just cause" under Section 1826 for refusing to answer questions before the Grand Jury. This argument should be rejected.

The District Court in the recent case of In re Grusse, Civil No. 75-42 (D.C. Conn. Feb. 19, 1975), aff'd, No. 2029, Slip. Op. 2039 (2d Cir. Feb. 27, 1975), held that the Government's denial was sufficient even though a "possibility" of electronic surveillance remained. The District Court stated that:

> "The question is whether the denial is adequate to obligate the witnesses to respond to the Grand Jury's questions or face contempt sanctions. On this issue, the decision in this Circuit in United States v. Persico, 491 F.2d 1156 (2d Cir. 1974), is instructive. The Court there held that where wiretapping had occurred pursuant to court order, a witness could not litigate the validity of the tap before responding to Grand Jury inquiry. The Court emphasized the legitimate concern of the Grand Jury for conducting its business promptly. Persico obviously demonstrates that the Second Circuit is willing to require witnesses

> to respond to Grand Jury questions even though all possibility of illegal wiretapping has not been ruled out. Nothing has been presented in this hearing to indicate that the risk that a denial of wiretapping in the form presented in the Government's affidavit will later turn out to be incorrect is any greater than the risk that a court-ordered wiretap will later turn out to be invalid on any of the many grounds available for attacking such orders." (Id., 4-5) (emphasis added)

* * *

To summarize, we believe that any claims that the Appellants were subjected to unlawful electronic surveillance were adequately put to rest by the affidavits of the Special Attorney which were filed and, if necessary, by the in camera conference which occurred. In the absence of any evidence at all that the denials were false, the Government has adequately met its burden of disproving the use of electronic surveillance. Lastly, assuming that some "possibility" of unlawful surveillance remained, that "possibility" does not constitute "just cause" under Section 1826 for refusing to answer questions before the Grand Jury.

The contentions made under POINT I of the Appellants' Brief should be rejected.

POINT II

THE APPELLANTS' FIRST AMENDMENT RIGHTS HAVE NOT BEEN VIOLATED BY THEIR CONTEMPT CITATIONS FOR REFUSING TO ANSWER GRAND JURY QUESTIONS.

Under POINT II of the Appellants' Brief it is claimed that "Appellants' Rights of Free Speech and Associational Privacy Are Violated By the Contempt Citation". Appellants also assert that "there is undisputed evidence that the Grand Jury's inquiry has not merely chilled, but utterly frozen, the Appellants' and others' rights of free and private association and discussion . . . ."

The factual evidence in the record to substantiate these assertions is scant indeed. In fact, it would appear that the "undisputed evidence" upon which the Appellants rely is the affidavit of Appellant Buscaglia which was filed in the District Court. (Consol. App., Item 19) True it is that the conclusory statements made in the affidavit were not disputed in the District Court; however, it remains for this Court to weigh the value of Appellant Buscaglia's assertions concerning a "chill" at the Gettysburg Social Club in light of his complete refusal to answer any questions in the Grand Jury regarding any occurrences there. (See Consol. App., Item 6.)

In spite of the lack of support in the record for the Appellants' assertions regarding a First Amendment violation, we proceed to respond to the legal issues raised.

(A) When a Grand Jury Is Investigating the Commission of Crimes There is No Requirement in Law or in Logic That a Preliminary Foundation for Its Inquiry be Laid.

The crux of Appellants' argument under POINT II of their Brief is that the Government must first provide a foundation or justification or preliminary showing before proceeding with any investigation that may cast a "chill" on the Appellants' associations. The short answer to this argument is that its rationale has been rejected by the Supreme Court of the United States.

The case of Branzburg v. Hayes, 408 U.S. 632 (1972), involved three newsmens' claim that a qualified privilege existed whereby newsmen could refuse to answer a grand jury's questions about crimes which they had witnessed. The newsmen argued that requiring their testimony before a grand jury would chill or interfere with their ability to gather information and, therefore, publish the news. The Supreme Court acknowledged that the possibility of such a chill existed. Nevertheless, the Court held that:

> "On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial." 408 U.S. at 691-92.

In their Brief the Appellants set forth a quotation which includes an excerpt from the Supreme Court's decision in Gibson v. Florida Legislative Investigating Committee, 372 U.S. 539 (1963). The Court in Branzburg redefined the holding of Gibson and other cases stating:

> "The requirements of those cases, see n. 18, supra, which hold that a State's interest must be 'compelling' or 'paramount' to justify even an indirect burden on First Amendment rights, are also met here. As we have indicated, the investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen, and it appears to us that calling reporters to give testimony in the manner and for the reasons that other citizens are called 'bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification.' Bates v. Little Rock, supra, 361 U.S. at 525, 80 S.Ct. at 417. If the test is that the government 'convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest,' Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 546, 83 S.Ct. 889, 894, 9 L.Ed.2d 929 (1963), it is quite apparent (1) that the State has the necessary interest in extirpating the traffic in illegal drugs, in forestalling assassination attempts on the President, and in preventing the community from being disrupted by violent disorders endangering both persons and property; and (2) that, based on the stories Branzburg and Caldwell wrote and Pappas' admitted conduct, the grand jury called these reporters as they would others -- because it was likely that they could supply information to help the government determine whether illegal conduct had occurred and, if it had, whether there was sufficient evidence to return an indictment." 408 U.S. at 700-01.

The Branzburg Court also considered the newsmens' claim that a preliminary showing be required before they were compelled to testify before the Grand Jury. The Court rejected this claim stating:

> "Similar considerations dispose of the reporters' claims that preliminary to requiring their grand jury appearance, the State must show that a crime has been committed and that they possess relevant information not available from other sources, for only the grand jury itself can make this determination. The role of the grand jury as an important instrument of effective law enforcement necessarily includes an investigatory function with respect to determining whether a crime has been committed and who committed it. To this end it must call witnesses, in the manner best suited to perform its task." 408 U.S. at 702.

The Supreme Court concluded this portion of its opinion by stating that:

> "We see no reason to hold that these reporters, any more than other citizens, should be excused from furnishing information that may help the grand jury in arriving at its initial determinations." 408 U.S. at 703. (emphasis added)

The Branzburg case dealt with the compelled testimony of newsmen before a grand jury. Since the press itself was involved, there was no doubt that the full panoply of First Amendment rights were brought into play. Furthermore, extensive affidavits were submitted to substantiate the chill potential there involved. (408 U.S. at 677.) In spite of all of this, the Supreme Court squarely held, inter alia, that a grand jury has the right to everyman's evidence when investigating the commission of crimes. (408 U.S. 702-03) (passim) We submit that the holding in Branzburg is surely controlling under the much less compelling circumstances of Appellants' First Amendment claims.

In their brief the Appellants place primary reliance on the case of Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972). In Bursey, two employees of The Black Panther newspaper were subpoenaed before a grand jury and asked a broad range of questions inquiring into areas such as the identity of the Black Panther Central Committee, the publication and distribution of the newspaper, its editorial processes, the identity of staff members and the possible commission of crimes. The Court found that the criminal statutes involved in the grand jury's investigation gave the Government a legitimate and compelling interest, but that the Government also had a certain "burden" to overcome when First Amendment rights were involved. (466 F.2d at 1086.) The Court then proceeded to review the questions which had been asked in the grand jury on an individual basis. The Court held that some questions such as those involving the publication and distribution of the newspaper were improper infringements on First Amendment freedoms. (Id. at 1087.) However, the Court also found that the questions concerning the commission of crimes were both relevant and proper. (Id. at 1070, questions 15-24.)

After the Supreme Court rendered its decision in Branzburg the Government sought a rehearing of the Bursey case before the Ninth Circuit. The Ninth Circuit rejected the contention that a rehearing was necessitated by Branzburg. However,

it is most significant that the Court stated in its rehearing opinion that:

> "Nothing in Bursey permits a grand jury witness to refuse on First Amendment grounds to identify a person whom he has seen committing a crime. Indeed, we have held that the witnesses can be required to answer questions much less directly related to criminal conduct." 466 F.2d 1090-91.

The case of Lewis v. United States, 501 F.2d 418, was decided by the Ninth Circuit last year. In that case the manager of a radio station was found in contempt of the grand jury pursuant to Section 1826. The Court rejected his claim that his First Amendment rights had been violated stating:

> "There was no evidence that the requests of the Grand Jury were in the course of 'official harassment of the press' and not for legitimate purposes of law enforcement." 501 F.2d at 423.

We submit that the foregoing authorities amply demonstrate that when a Grand Jury is inquiring into the commission of crimes it need not delay its investigation to make a preliminary showing that its inquiry is bona fide. Having established this much, we turn to an examination of the Grand Jury investigation in the instant appeals.

(E) The Questions Asked of Appellants by the Grand Jury Demonstrate that It Was Investigating the Commission of Serious Federal Crimes.

In their brief and during oral argument in the District Court Appellants have claimed that the Government's inquiry would require more substantiation if the questions asked in the Grand Jury involved the "Buffalo Chapter of the NAACP or the B'nai B'rith". The Government disagrees. And, in support of this position we would direct this Court's attention to the questions that were asked of the Appellants by the Grand Jury. (See Consol. App., Items 6 and 10-13).

All of the questions asked by the Grand Jury dealt directly or indirectly with the criminal statutes which are set forth in the District Court's orders of immunity for the Appellants. That is, Sections 1955 (illegal gambling business), 894-96 (extortionate credit transactions) and 1962 (racketeering) of Title 18 of the United States Code. (See., e.g., Buscaglia Record on Appeal, Exhibit 1.) None of the Appellants was asked even a single question about the cultural, social, political or philosophical goals or activities of the "social" clubs or any of the members. Had such questions been asked this might be a different case.

We submit that if questions which were similar to those asked of Appellants were propounded to members of the "Buffalo

Chapter of the NAACP or the B'nai B'rith" those questions would be nonetheless proper.

Certain crimes such as the maintenance of an illegal gambling business (Section 1955 of Title 18) and racketeering (Section 1962 of Title 18) require the "association" of several persons as an element of their commission. When a grand jury undertakes a serious inquiry into the commission of such crimes, some "chilling" effect is bound to occur simply because a number of witnesses are called to testify. However, this chilling effect is not sufficient to bring the grand jury's inquiry to a grinding halt while it demonstrates the existence of the very crimes which are the subject of its inquiry. As stated by the Supreme Court in Hale v. Henkel, 201 U.S. 43 (1906):

> "It is impossible to conceive that in such cases the examination of witnesses must be stopped until a basis is laid by an indictment formally preferred, when the very object of the examination is to ascertain who shall be indicted." 201 U.S. at 65.

There is a presumption of regularity in regard to a grand jury's proceedings. In re Grand Jury Proceeding (Schofield), 486 F.2d 85 (3d Cir. 1973). We submit that this presumption and the particular questions which were asked of Appellants demonstrate conclusively that the investigation in question was in all ways regular.

The District Court did not err in finding that the Appellants' First Amendment rights were not violated.

* * *

In the closing portion of their brief Appellants suggest that there is some basis for comparing the Government's current efforts to combat organized crime with the "excesses of the McCarthy period. . . ." The hyperbole here is obvious; the inaptness of the comparison is patent. None of the appellant-witnesses was asked a single question about his political, social or philosophical beliefs; not a single question was asked about the "conversations concerning politics, the affairs of the day, and other matters" which are alleged to have transpired; no questions at all were asked concerning the political, cultural or social activities of the clubs or the individual members. All of the questions that were asked had some connection with the commission of crimes. Moreover, the crimes could not be considered "political" by any twist of the imagination. They involved gambling, loansharking and racketeering.

True it is that the Federal Courts must be zealous guardians of our constitutional liberties. We submit that the record of these proceedings before the Grand Jury and the District Court amply demonstrates that none of the Appellants' rights, constitutional or otherwise, have been violated.

No. 75-1080
No. 75-1079
No. 75-1105
No. 75-1106
No. 75-1120
No. 75-1111
No. 75-1112

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

IN THE MATTER OF:

JOSEPH MOSES, A Grand Jury Witness, Docket No. 75-1080
JOSEPH BUSCAGLIA, A Grand Jury Witness, Docket No. 75-1079
LAWRENCE PANARO, A Grand Jury Witness, Docket No. 75-1105
GASPER BONA, A Grand Jury Witness, Docket No. 75-1106
FRANK MAMBRINO, A Grand Jury Witness, Docket No. 75-1120
ROBERT OLIVER, A Grand Jury Witness, Docket No. 75-1111
DECIMO CICERO, A Grand Jury Witness, Docket No. 75-1112

GOVERNMENT'S AFFIDAVIT OF SERVICE

On Appeal from the United States District
Court for the Western District of New York

JAMES W. GRESENS, Special Attorney for the Department of Justice, being duly sworn in the manner provided by law, deposes and states that on April 5, 1975 he personally deposited in the United States Mail one copy of the BRIEF FOR THE UNITED STATES OF AMERICA and a SUPPLEMENTAL BRIEF thereto addressed to each of the Appellants' attorneys as listed below:

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The foregoing is true and correct to the best of my knowledge.

James W. Gresens

JAMES W. GRESENS
Special Attorney
U.S. Department of Justice

Sworn to Before Me

This 5th Day of April, 1975.

Alice A. Monaco

ALICE A. MONACO
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1976

CONCLUSION

For the reasons stated above, the orders of the District Court remanding the Appellants pursuant to Section 1826 of Title 28 should be upheld.

Respectfully submitted,

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